

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

SUN CAB COMPANY, INC., d/b/a
NELLIS CAB COMPANY,

Defendant.

Case No. 2:03-CV-01230-KJD-RJJ

ORDER

Presently before the Court is Plaintiff's Motion in Limine to Exclude Defendant's Statistical Expert (#49). Defendant filed a response in opposition (#52).

I. Background

Plaintiff Equal Employment Opportunity Commission ("EEOC") alleges that Defendant ("Nellis Cab") violated Title VII of the Civil Rights Act of 1964 ("Title VII") by failing to hire a class of similarly situated individuals because of their national origin, Ethiopian. In support of its claim the EEOC offered the report of its expert, Joseph Donovan, who concluded that cab drivers of Ethiopian national origin are under-represented at Nellis Cab to a statistically significant degree.

In response, Defendant has offered two opinions of Richard Singleton, Ph.D. In the first, Singleton concludes that Ethiopians are not proportionately distributed among the Las Vegas cab

1 companies. Singleton opines that Nellis is not a statistical exception since eight out of sixteen cab
2 companies have a statistically significant deviation from what would be expected if Las Vegas cab
3 drivers were randomly distributed amongst all companies. In the second opinion, Singleton
4 concludes that during the final quarter of 2002, Nellis hired a larger percentage of Ethiopian
5 applicants than non-Ethiopian applicants. Singleton bases his second opinion on the few months of
6 applications preserved by Nellis. Singleton determined that Nellis hired one (1) of eight (8)
7 Ethiopian applicants and thirteen (13) of 386 non-Ethiopian applicants.

8 On April 28, 2006, the EEOC filed the present motion seeking to exclude Defendant's expert,
9 Dr. Singleton, from offering his opinions. The EEOC complains that Dr. Singleton's opinions are
10 irrelevant and unreliable and should be excluded under Federal Rule of Evidence 401, 403, and 702
11 and in accordance with the Daubert evidence trilogy: Daubert v. Merrell-Dow Pharms., Inc., 509
12 U.S. 759 (1993), General Electric Co. v. Joiner, 522 U.S. 136 (1998), and Kumho Tire Co., Ltd. v.
13 Carmichael, 526 U.S. 137 (1999). Primarily, Plaintiff complains that Dr. Singleton's first opinion
14 misstates what is at issue in this action and is not relevant to Nellis's hiring practices. Plaintiff also
15 complains that Singleton's second opinion is based on too small a sample size and its probative value
16 is outweighed by its ability to confuse or mislead the jury. Defendant Nellis responds by arguing that
17 Plaintiff's complaints about Dr. Singleton's opinions go the weight, and not the sufficiency, of the
18 evidence.

19 II. Analysis

20 In a case in which the plaintiff has alleged that his employer has engaged in a "pattern or
21 practice" of discrimination, "[s]tatistical data is relevant because it can be used to establish a general
22 discriminatory pattern in an employer's hiring or promotion practices. Such a discriminatory pattern
23 is probative of motive and can therefore create an inference of discriminatory intent with respect to
24 the individual employment decision at issue." Obrey v. Johnson, 400 F.3d 691, 694 (9th Cir.
25 2005)(quoting Diaz v. Am. Tel. & Tel., 752 F.2d 1356, 1363 (9th Cir.1985)); see also McDonnell
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1 Douglas v. Green, 411 U.S. 792, 805 n. 19, (“The District Court may, for example, determine, after
2 reasonable discovery that the (racial) composition of defendant's labor force is itself reflective of
3 restrictive or exclusionary practices.”) (internal quotation marks omitted); Coral Constr. Co. v. King
4 County, 941 F.2d 910, 918 (9th Cir.1991) (“[F]or purposes of Title VII, ‘[w]here gross statistical
5 disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or
6 practice of discrimination.’”) (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08
7 (1977)); Diaz, 752 F.2d at 1363 (“In some cases, statistical evidence alone may be sufficient to
8 establish a *prima facie* case.... Even when not sufficient to establish a *prima facie* case, statistical
9 evidence is helpful in showing that an employer's articulated reason for the employment decision is
10 pretextual” (citations omitted)). Employers are entitled to an opportunity to rebut any inference of
11 discrimination raised by a plaintiff’s statistical showing. See Hazelwood, 433 U.S. at 309-10.

14 Daubert made clear that expert testimony should not be considered in a case unless the expert
15 has genuine expertise and will assist the trier of fact in understanding or determining a fact in issue.
16 See Adams v. Ameritech Servs., Inc., 231 F.3d 414, 423 (7th Cir. 2000)(citing Daubert, 509 U.S. at
17 592). In this case, Plaintiff is not disputing the expertise of Dr. Singleton. Therefore, in evaluating
18 the admissibility of Dr. Singleton’s testimony, the Court must consider “the twin requirements: of
19 relevance and reliability.” Id. The Court must exercise its gatekeeping function by examining the
20 expert’s qualifications (not in dispute), the methodologies used, and the relevance of the final results
21 to the ultimate questions before the jury. Id.

23 A statistical study may fall short of proving a plaintiff’s or defendant’s case, but still remain
24 relevant to the issues in dispute. Therefore, Singleton’s opinion may be relevant, and therefore
25 admissible, even if it is not sufficient to rebut entirely Plaintiff’s *prima facie* case or establish, alone,
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1 a legitimate non-discriminatory reason for its actions. Thus, objections to an opinion's relevance
 2 generally go to "the weight, not the admissibility of the statistical evidence," and should be addressed
 3 by rebuttal, not exclusion. Obrey, 400 F.3d at 695(citing Int'l Bhd. of Teamsters v. United States,
 4 431 U.S. 324, 340; Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1476 (9th Cir. 1995)). As
 5 the Supreme Court pointed out, "Statistics showing racial or ethnic imbalance are probative . . .
 6 because such imbalance is often a telltale sign of purposeful discrimination . . . Considerations such
 7 as small sample size may, of course, detract from the value of such evidence, and evidence showing
 8 that the figures for the general population might not accurately reflect the pool of qualified job
 9 applicants would also be relevant." Teamsters, 431 U.S. at 339-40 n. 20(citations omitted); see also
 10 Bazemore v. Friday, 478 U.S. 385, 400 (1986)(per curiam) ("Normally, failure to include variables
 11 will affect the analysis' probativeness, not its admissibility.") (Brennan, J., concurring in part).

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 14 In some cases, statistical evidence may suffer from serious methodological flaws and can be
 15 excluded, consistent with the trial court's "gatekeeping" power, under Rule 702. See Kumho, 526
 16 U.S. at 156-57; Daubert, 509 U.S. at 589-90.¹ Factors which may bear on admissibility include: (1)
 17 whether the "scientific knowledge ... can be (and has been) tested"; (2) whether "the theory or
 18 technique has been subjected to peer review and publication"; (3) "the known or potential rate of
 19 error"; and (4) "general acceptance." Daubert, 509 U.S. at 593-94. The Rule 702 inquiry is a
 20 "flexible one" whose "overarching subject is the scientific validity and thus the evidentiary relevance
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 23 ¹Rule 702 provides:

24 If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the
 25 evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,
 26 experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1)
 the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable
 principles and methods, and (3) the witness has applied the principles and methods reliably to the
 facts of the case.

1 and reliability of the principles that underlie a proposed submission.” Id. at 594-95; see also Kumho
2 Tire, 526 U.S. at 141 (“[T]he test of reliability is ‘flexible,’ and Daubert’s list of specific factors
3 neither necessarily nor exclusively applies to all experts or in every case.”).

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5 Here, Dr. Singleton’s opinion is based entirely on statistical disparities. As a general matter,
6 so long as the evidence is relevant and the methods employed are sound, neither the usefulness nor
7 the strength of statistical proof determines admissibility under Rule 702. See Obrey, 400 F.3d at 696
8 (citing Metabolife Int’l, Inc. v. Wornick, 264 F.3d 832, 843 (9th Cir. 2001) (“Rather than disqualify
9 the study because of ‘incompleteness’. . . , the district court should examine the soundness of the
10 methodology employed.”). In sum, Singleton’s first opinion is relevant for what it is purported to
11 analyze: statistical significance of deviations from the “the norm” in all the cab companies. While the
12 opinion, by itself, does not constitute direct evidence that Defendant was not acting without a
13 discriminatory motive, it addresses the overall picture of the labor pool and the employment of
14 Ethiopians amongst the cab companies. Therefore, it should be admitted for whatever probative
15 value it has. See Adams v. Ameritech Servs., Inc., 231 F.3d 414, 425 (7th Cir. 2000) (“No one piece
16 of evidence has to prove every element of the [party’s] case; it need only make the existence of any
17 fact that is of consequence more or less probable.”). Plaintiff’s objections to the admission of
18 Singleton’s opinion go to weight and sufficiency rather than admissibility. Id. Therefore, Plaintiff’s
19 motion to exclude Dr. Singleton’s first opinion is denied.
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22 Plaintiff’s objections to Singleton’s second opinion based on the small sample size of
23 Ethiopian applicants, must also be overruled. “Considerations such as small sample size may, of
24 course, detract from the value of such evidence,” but it is admissible if it is relevant. See Obrey, 400
25 F.3d at 695(quoting Teamsters, 431 U.S. at 339-40 n.20). In this case, the fact that Nellis Cab hired
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1 one Ethiopian driver in a three-month period is relevant, especially to the overall picture of Nellis'
2 hiring practices. Defendant has carried its burden in establishing that the proposed opinion is sound
3 enough methodologically and is relevant so that a fact finder might take it into account. See Adams,
4 231 F.3d at 425. Furthermore, Plaintiff's motion to exclude the opinion under Federal Rule Of
5 Evidence 403 is denied.
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7 III. Conclusion

8 Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion in Limine to Exclude
9 Defendant's Statistical Expert (#49) is **DENIED**.

10 DATED this 26th day of June 2006.
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16 Kent J. Dawson
17 United States District Judge
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